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Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GTE MIDWEST INCORPORATED,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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December 30, 1997

56 pp

QUESTIONS PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), requires incumbent local telephone companies to sell their retail services to new entrants at wholesale rates, so that entrants can resell the incumbents' service and thus compete without owning any local exchange facilities of their own. *See* 47 U.S.C. § 251(c)(4). The Act also provides a method for entrants who have some facilities of their own to fill out any gaps in their networks by using parts of an incumbent's existing network. The Act thus requires incumbents to provide access to "unbundled network elements." *See id.* § 251(c)(3).

This Conditional Cross-Petition -- conditional upon the Court's granting review on Question 2 presented by the Federal Communications Commission in its petition in *FCC v. Iowa Utilities Board*, No. 97-831 (or the same question as presented in Petition Nos. 87-821, 87-829) -- presents three questions bearing on the Court of Appeals' construction of the duty imposed by section 251(c)(3) requiring incumbents to provide entrants access to elements of their networks:

(1) Did the Eighth Circuit err in affirming the FCC's determination that entrants could purchase from an incumbent telephone company *all* of the network elements needed to provide service without using any facilities of their own?

(2) Did the Eighth Circuit err in affirming the FCC's determination that the term "network elements" is not limited to equipment in an incumbent's call routing network, but rather includes virtually all important aspects of the incumbent telephone company's business, including separate software systems used for business functions (such as billing) and distinct

QUESTIONS PRESENTED
(continued)

services that are separately available for purchase at wholesale rates under section 251(c)(4)?

(3) Did the Eighth Circuit err in accepting the FCC's determination that in evaluating whether access to a particular network element was "necessary" or whether a failure to provide access to such an element would "impair" an entrant's ability to provide service, *see* 47 U.S.C. § 251(d)(2), only alternative facilities available within the incumbent's own network should be considered?

PARTIES TO THE PROCEEDING

The petitioner is GTE Midwest Incorporated. Respondents are the Federal Communications Commission and the United States of America.

The parties to the underlying proceedings are listed in the appendix to the petition for a writ of certiorari in *AT&T Corp. et al. v. Iowa Utilities Board, et al.*, No. 97-826, at 1a-4a, 73a-78a, 92a.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, GTE Midwest Incorporated advises the Court that it is a subsidiary of GTE Corporation. In addition, GTE Corporation has the following other subsidiaries or affiliates that have outstanding securities in the hands of the public:

BC TELECOM, Inc.
BBN Corporation
Cable-Axion Digitel Inc.
Cable-Axion Quebec Inc.
Caribbean Reservation Center, C. por A.
Communications Telefonicas, C. por A.
Conagro Telecommunications, S.A.
CTI Compania de Telefonos del Interior S.A.
CTI North Compania de Telefonos del Interior S.A.
Digital Courier International Inc.
GTE California Incorporated
GTE Directories Corporation Ltd.
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE Leasing Corporation
GTE Mobilnet of Florence, Alabama Incorporated
GTE Mobilnet of Jacksonville Incorporated
GTE Mobilnet of Jacksonville II Incorporated
GTE Mobilnet of Wilmington Incorporated
GTE Mobilnet of Wilmington II Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE Service Corporation
GTE South Incorporated
GTE Southwest Incorporated
GTE Yellow Pages Hungary Kft
La Compagnie de Telephone Anglo-Canadienne/Anglo-Canadian Telephone Company

RULE 29.6 STATEMENT
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MTX Italia
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Quebec-Telephone
Radiowealth, Inc.
The Micronesian Telecommunications Corporation
Zona France Las Americas

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GTE Midwest Incorporated ("GTE") brings this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's decision on review of the Federal Communications Commission's First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (Aug. 8, 1996), is reported at 120 F.3d 753, and is reprinted in the appendix to the petition for certiorari filed by AT&T in No. 97-826.[1] AT&T App. 1a-67a. The Eighth Circuit's subsequent decision granting certain petitions for rehearing has been incorporated into the reported text of the opinion at 120 F.3d 753, and is also reproduced separately in the appendix. AT&T App. 69a-72a. The FCC's First Report and Order is reported at 11 FCC Rcd. 15499 (1996).

JURISDICTION

The Court of Appeals had jurisdiction to review the FCC's regulations pursuant to 28 U.S.C. § 2342(i) and 47 U.S.C. § 402(a). The Eighth Circuit issued its initial decision on July 18, 1997, and issued its decision on rehearing on October 14, 1997. This Court has jurisdiction to review the Court of Appeals' judgment under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276, and rules promulgated by the FCC under the Act, as set out in the rulemaking *In the Matter of Implementation of*

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[1] Citations to the Court of Appeals' opinion refer to the Appendix to the petition filed by AT&T in *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, No. 97-826.

the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996).

STATEMENT

In their petitions for certiorari in these cases, the Federal Communications Commission ("FCC") and several long-distance telephone companies, including AT&T and MCI, challenge one isolated facet of the Court of Appeals' decision concerning the requirement under the Telecommunications Act of 1996 ("1996 Act") that incumbent telephone companies make "elements" of their networks available for use by competitors. *See* Petition for Certiorari in *FCC v. Iowa Utilities Board*, No. 97-831, and related petitions (Nos. 97-826, 97-829). Specifically, Question 2 in the FCC's petition challenges the Court of Appeals' determination that incumbents may not be required to provide "unbundled elements" in pre-assembled packages.

The FCC and its supporters fail to disclose, however, how Question 2 is inextricably interrelated with at least three other questions decided by the Court of Appeals *in their favor* construing the *very same statutory duty*. Specifically, in the Court of Appeals, GTE and the other incumbent telephone companies had challenged the FCC's rule that a new entrant could purchase from an incumbent *all* of the network elements needed to provide completed telephone service without using any facilities of its own. The Court of Appeals *upheld* the FCC's rule, but only on the express rationale that the 1996 Act imposed on the new entrant the additional costs of combining those network elements together, and thereby prevented new entrants from evading the wholesale pricing provisions of the 1996 Act. Accordingly, the Court of Appeals vacated the related FCC rule -- 47 C.F.R. § 51.315(b) -- that further required the incumbent telephone company to provide the new entrant "unbundled [network] elements" in a preassembled package as they are used in the incumbent's operating network.

The FCC and its supporters seek review of the Court of Appeals' decision to vacate the requirement that the incumbent must provide the elements combined together *without* review of the Court of Appeals' decision that a new entrant could purchase all of the network elements needed to provide completed telephone service. But, as the Court of Appeals made clear in its order on rehearing, the latter decision (on which the FCC prevailed) depended upon the former decision (which the FCC seeks to reverse).

Moreover, the FCC and its supporters also fail to explain that the Court of Appeals' decision with respect to whether the incumbent telephone company must provide preassembled packages of elements also relates closely to two other important predicate questions: first, what constitutes a "network element" under the Act, and second, when must access to network elements be provided. By accepting both the FCC's expansive definition of network elements and its diluted standard for requiring access to elements, the Court of Appeals made it far easier to rely on an end-to-end set of network elements as a substitute for wholesale service. As a result, it was only the requirement that entrants must combine elements for themselves that preserved what the Court of Appeals recognized was a critical distinction between buying elements and buying wholesale service.

In short, the Court of Appeals held that a new entrant may purchase all of the parts of the incumbent telephone company's network instead of buying the whole product (finished telephone service), but only because the new entrant must assume the costs of putting all those parts together. The FCC and its supporters seek review of the rationale and qualification for the Court of Appeals' decision to allow a new entrant to purchase all parts of the incumbent telephone company's business *without* seeking review of the primary decision itself. Granting review solely on the question presented by the FCC would thus not only be basically unfair, it would also bring

before the Court only one isolated portion of the Eighth Circuit's harmonized construction on the Act's duty to provide network elements. Proceeding with such an out-of-context and partial review of the lower court's integrated approach to the statutory duty would almost surely result in a distorted reading of the Act.

Accordingly, although respondent GTE believes that the Court should *deny* review of *all* questions presented by the petitions, in the event that the Court grants review on Question 2 of the FCC's petition (or on the same question in the other petitions), GTE respectfully submits that the Court should also grant review of the questions presented by this conditional cross-petition.

A. Regulatory Background Prior to 1996

For decades prior to the passage of the Telecommunications Act of 1996, local telephone service was regulated by state public utility commissions as a natural monopoly. The investment required to construct a system of lines and switches connecting every home and business in a given area was so vast that it made sense economically for only one company to build such a network. State utility commissions therefore established exclusive franchises to permit only one local exchange carrier (or LEC) to operate in a given area.

The exclusive franchise system was important not only for encouraging companies to make the massive investment needed to build first-rate telephone networks, but also for promoting another central goal of state regulators, namely, ensuring that basic telephone service would be available to all residents at affordable rates -- a goal known as "universal service." Establishing exclusive franchises allowed state regulators to build a series of subsidies into the rates for service that have kept basic residential rates low. For example, most States set rates so that business service is priced well in excess

of cost while residential service (particularly service to rural subscribers) is priced below cost. *See, e.g., In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, at ¶ 17 (May 8, 1997) (explaining that exclusive franchises allowed States to maintain implicit subsidy systems in which "some consumers (such as urban business customers) could be charged rates for local exchange and exchange access service that significantly exceeded the cost of providing service, and the rates paid by those customers would implicitly subsidize service provided by the same carrier to others").

This regulatory background is critical for understanding the challenges regulators would face in introducing competition into the market for local telephone service. The exclusive franchise system and the protection it provided from competition were essential for operating the traditional inter-customer and inter-service subsidy scheme that kept residential rates low. A primary concern for regulators (state or federal), therefore, is accomplishing any transition to competition in such a way that universal service is not undermined.

B. The Advent of Competition and the Telecommunications Act of 1996

By the early 1990s, advances in technology began to erode the foundations of the traditional view that local telephone service was a natural monopoly. As it began to seem possible that rival companies could provide competing forms of local service, many States began to dismantle their franchise systems and to promote competition in local telephony. The Telecommunications Act of 1996 codified and expanded on this trend and mandated on a national level that local telephone service should be opened to competition.

To speed the transition to competition, Congress imposed several duties on incumbent LECs. To start, Congress required incumbents to allow entrants to "interconnect" with their networks so that new entrants could complete calls between

their own customers and customers served on the incumbent's network. *See* 47 U.S.C. § 251(c)(2). In addition, Congress imposed two obligations on incumbents requiring them to make their own facilities available so that entrants could provide service using the incumbent's equipment.

First, Congress required incumbents to make individual "elements" or pieces of their networks available on an "unbundled basis" so that entrants could "combine such elements in order to provide" telecommunications service. 47 U.S.C.§ 251(c)(3). Under the Act, a "network element" is "a facility or equipment used in the provision of a telecommunications service," including the "features, functions and capabilities that are provided by means of such facility or equipment." *Id.* § 153(29). The Act thus requires incumbents to make pieces of their network equipment available to new entrants so that entrants may use them to provide service. Congress also carefully limited the duty to provide network elements by directing the FCC to consider, in determining what elements should be made available, whether access to proprietary elements was "necessary" and whether a failure to provide access to other elements would "impair" an entrant's ability to provide service. 47 U.S.C. § 251(d)(2). These limitations, by requiring entrants to meet some threshold of need before being granted access to an incumbent's network, protected Congress's primary goal of attaining "meaningful facilities-based competition" to the extent possible. S. Conf. Rep. 104-230, at 148 (1996). At the same time, the duty to provide elements accommodated what Congress recognized as the inescapable reality that "it is unlikely that competitors will have a fully redundant network in place" when they first enter the market. *Id.* Access to elements ensured that entrants who had *some* local exchange facilities of their own could use parts of the incumbent's network to fill out the facilities they needed to provide service and thus ensured that they could begin to compete without having to construct an entirely new network.

Second, Congress required incumbents to make their finished retail service available to new entrants at wholesale rates. *See id.* § 251(c)(4). In that way, new entrants could "compete" without having *any* network facilities of their own by simply buying the incumbent's service and reselling it at a mark-up under their own name.

C. The FCC's First Report and Order

In issuing rules purporting to implement the Act, the FCC radically expanded the unbundling obligation that Congress had imposed. To start with, while the Act defined a network element as routed in a physical "facility or equipment used in the provision of a telecommunications service," 47 U.S.C. § 153(29), the FCC concluded that network elements included not only the actual parts of a LEC's call-routing network (and any features or functions provided by those facilities) but also entirely separate software systems known as operational support systems (OSS). *See* First Report and Order ¶¶ 516-19, App. 3a-7a.[2] Such systems included software for billing, for processing customer orders, and for scheduling repair visits. In other words, the FCC determined that a new entrant should have access to any systems the incumbent had developed for running its business efficiently, even if they were not part of the essential call-routing facilities in the local network.

Next, the FCC diluted the standards Congress had set for determining when access to elements should be granted. While the Act directs the FCC to consider, at a minimum, whether access to proprietary elements is "necessary" and whether a failure to provide access to other elements will "impair" an entrant's ability to provide service, 47 U.S.C. § 251(d)(2), the FCC determined that any evaluation of these tests should be made solely by looking for substitute facilities within the

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[2] Paragraphs of the First Report and Order not reprinted in the AT&T Appendix are reprinted in an appendix to this conditional cross-petition. Citations to the paragraphs reprinted herein are denominated "App."

incumbent's own network. *See* First Report and Order ¶¶ 283, 287, App. 1a-2a. The availability of comparable facilities from other sources (for example, a tandem switch or trunking facilities from a long distance carrier) was irrelevant in the FCC's view. As a result, because there are rarely duplicate facilities for the same function within an incumbent's own network, under the FCC's standard, access to elements is virtually always required.

In addition, the FCC ruled that there was nothing in the Act's unbundling duty requiring purchasers of elements to use the elements they acquired from an incumbent in combination with some facilities of their own. Instead, the FCC determined that a new entrant could essentially buy the *entire network* as "elements" and provide what would nominally be branded as its own service while using nothing but "elements" of the incumbent's existing network. *See* First Report and Order ¶¶ 328-331, AT&T App. 242a-244a. Thus, under the FCC's construction, an entrant buying network elements could provide service without any facilities of its own, just like a purchaser of service at wholesale. Moreover, by expansively defining "elements" to include all the software systems that incumbents used to perform business functions such as ordering and billing, the FCC ensured that an entrant could obtain virtually the complete ability to run a local exchange business simply by buying "elements" of an incumbent's business.

Indeed, going even further, the FCC concluded that entrants could obtain all the elements needed to provide finished local service already assembled into a fully operational package. Entrants would not be required to do any "combin[ing]" of elements whatsoever. *See* First Report and Order ¶¶ 294-296, AT&T App. 232a-233a. Instead, they could order all the elements of an incumbent's network, from end to end, and obtain them as a fully operational platform providing local service -- and the platform would even include software

to accomplish billing and other functions. Taken all together, therefore, the FCC's rules on network elements made it possible for an entrant effectively to obtain an incumbent's finished service for resale either through the purchase of network elements or through the Act's resale provisions.

This radical expansion of the unbundling provisions had enormous potential significance because at the same time that it made the purchase of elements another avenue for simply reselling an incumbent's finished service, the FCC also concluded that the pricing standards for wholesale service and for elements were dramatically different. The Act provided that network elements must be made available at rates "based on the cost" of providing them. 47 U.S.C. § 252(d)(1). Wholesale rates for services were to be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested," less the costs "that will be avoided by the local exchange carrier" through selling the service at wholesale rather than at retail. *Id.* § 252(d)(3).

By pegging wholesale prices to existing retail rates, the Act ensured that wholesale prices would have built into them the same subsidies that state regulators impose on incumbents and thus ensured that new entrants buying service for resale would contribute to the support of universal service. The FCC decided, however, that under the pricing standard for network elements, which requires prices "based on . . . cost," the costs of subsidies that incumbents are required to support could not be taken into account. *See* First Report and Order ¶¶ 712-713, App. 13a-15a. Thus, for example, the direct cost of the elements an incumbent LEC uses to serve a business customer in an urban area might be $25, but under a state-imposed subsidy system, the incumbent may have to charge that customer $50 in order to cover the costs incurred in providing

residential customers with service below cost.[3] Under the FCC's interpretation of the unbundling obligation and the Act's pricing standards, a new entrant would have a choice of serving that customer using solely an incumbent's facilities by two different routes. It could obtain all the elements needed to provide service already assembled in a functioning package at a price based on the $25 cost of the elements, or it could buy service from the incumbent at a wholesale rate based on a discount from the incumbent's $50 resale rate. As AT&T itself made clear to investment analysts, the option of paying cost-based rates for elements would provide a dramatically cheaper route for establishing service.[4]

The FCC's expansion of the unbundling obligation thus provided entrants two routes for obtaining an incumbent's service for resale. Under one route, the entrant could buy service at wholesale and pay the wholesale rate under the Act, thereby automatically contributing to the same universal service subsidies imposed on the incumbent. Under the other avenue, by simply labeling its purchase as a request for elements, the entrant would get a price *below* the wholesale rate and could avoid any contribution to universal service

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[3] GTE challenged the FCC's pricing determination before the Eighth Circuit, but after deciding that the FCC lacked jurisdiction to promulgate pricing rules, the Court declined to address the substance of the FCC's rules. The same opportunity for arbitrage remains, however, because a similar interpretation of the pricing standards has prevailed in the decisions of state commissions conducting arbitrations under the Act. GTE is currently challenging this construction of the cost-based pricing standard in district court review actions under section 252(e)(6) of the Act.

[4] *See* Transcript, AT&T Investment Community Meeting, at 4 (Mar. 3, 1997) (comments of John Zeglis).

whatsoever.[5] The FCC's rules thus provided a recipe for rampant arbitrage. They would have guaranteed new entrants the ability to undercut the incumbent's own retail rates while still using solely the incumbent's own facilities to provide service. And at the same time they would have allowed entrants to pocket for themselves the very revenue used to subsidize affordable residential service.

D. The Eighth Circuit's Opinion

On review before the Eighth Circuit, GTE and other incumbent LECs argued that the FCC had grossly distorted the unbundling duties imposed by Congress and had ignored the basic structure of the Act by making the purchase of unbundled elements an alternative avenue for obtaining an incumbent's finished local service.

In a methodical construction of the Act, the Eighth Circuit affirmed some aspects of the FCC's reading and reversed others. First, the Eighth Circuit affirmed the FCC's rules concerning what constituted a "network element." The Court thus agreed that OSS and even distinct services such as operator services fell within the ambit of the Act's definition of network elements.

Second, the Court agreed with the FCC's construction of the standards in the Act for determining when access to network elements is required. The Court thus concluded that incumbents would have to provide access to unbundled elements of their networks even when "a network element could be obtained elsewhere" because a different rule would

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[5] Section 254(f) of the Act commands that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute . . . to the preservation and advancement of universal service." The FCC, however, made it clear that in its view entrants could begin purchasing elements at rates that did not reflect universal service costs before States had established equitable mechanisms for spreading the universal service burden.

simply allow incumbents to "evade" the unbundling duty. AT&T App. 48a.

Third, the Court also affirmed the FCC's ruling that entrants could provide service using solely elements obtained from incumbents. Entrants buying elements, in other words, need not provide any of their own facilities. AT&T App. 54a-55a. The Court explained, however, that its ruling on this point depended critically on its companion ruling that would prevent the use of network elements from becoming an end-run around the resale provisions of the Act. Namely, the Court also ruled that under the plain terms of the Act, incumbents could not be forced to provide preassembled packages of elements as the FCC had attempted to require in 47 C.F.R. § 51.315(b). Rather, entrants would have to combine the elements for themselves. The Court explained that section 251(c)(3) required incumbents to provide elements "in a manner that allows requesting carriers to combine such elements." The Act thus "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." AT&T App. 53a. Accordingly, the Court of Appeals vacated the FCC's Rule in § 51.315(b).

In the Court's view, this decision was crucial for preventing the purchase of elements from becoming simply an avenue for undermining the Act's resale provisions. As the court explained, "our decision requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry and simultaneously makes resale a distinct and attractive option." AT&T App. 56a-57a. Indeed, in striking down the FCC's rule requiring incumbents to provide pre-assembled packages of elements, the Court emphasized that such packages, by making it possible to obtain effectively the same thing as finished service at cost-based rates, "would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to

unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." *Id.* 71a.

Under the Court's reading of the Act, therefore, the expansive scope of the term "network elements" and the ability of entrants to rely solely on elements to provide service (without contributing facilities of their own) were balanced against the requirement that entrants would have to shoulder the burden of combining elements for themselves. It was the additional costs associated with combining elements that would prevent expansive access to elements from becoming a complete end-run around the resale provisions of the Act, thereby undermining universal service.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

GTE believes that, *taken as a whole*, the Eighth Circuit's reading of the unbundling obligation imposed by the Act provides a workable and balanced construction of the statute and that the decision below does not merit further review. In particular, the Court of Appeals recognized that, taken together, (i) the FCC's expansive definition of network elements, (ii) its reading of the standard making access to elements available on demand, (iii) its determination that entrants could rely solely on network elements to provide service, *and* (iv) its requirement that incumbents provide elements already pre-assembled in operational packages would promote impermissible arbitrage by making network elements an alternative, and substantially less expensive, route for effectively obtaining an incumbent's finished service. The Eighth Circuit concluded that such a result would undermine the structure of the Act and that the plain terms of section 251(c)(3) precluded the FCC's rules requiring incumbents to provide pre-assembled packages of elements; instead, entrants must combine elements for themselves. That judgment provides a workable method for keeping the use of network

elements and wholesale service distinct routes of entry, and it thus prevents entrants from exploiting a naked opportunity for arbitrage in order to pocket for themselves the revenues that currently support universal service. Rather than subjecting the industry to further uncertainty at this point, therefore, it would be far better to allow competition to continue to develop under the guidelines set by the Eighth Circuit.

Nevertheless, if this Court decides to hear the FCC's challenge to the ruling requiring entrants to combine elements for themselves (Question 2 in the FCC's petition), it should not address that question in isolation. The FCC and its supporters seek review of only one narrow aspect of the Eighth Circuit's overall interpretation of the unbundling obligations imposed under section 251(c)(3). Specifically, the FCC seeks review of a single issue relating to network elements on which the FCC lost below -- the ruling that entrants cannot obtain network elements already pre-assembled into complete packages for providing service, but rather must combine such elements for themselves. By focusing on this one issue in isolation, the FCC and its supporters present a deceptively simple picture of a single issue of statutory construction. If this Court were to grant review at all on the Eighth Circuit's construction of the duty to provide network elements, however, it should not allow the FCC and long distance carriers to pluck out this one aspect of the complex decision below to have it reviewed outside the context provided by a broader understanding of the Act. Rather, the Court should also grant review on the three closely related questions raised here.

First, the Court should address the Eighth Circuit's ruling that entrants can provide service solely by purchasing network elements and need not have any facilities of their own -- *a ruling that the Eighth Circuit explicitly rested on its holding that incumbents would not be required to provide elements as a finished package*. *Second*, this Court should review the Eighth Circuit's expansive construction of the definition of

network elements. By making it possible to operate a functioning business using solely inputs provided as "elements" from an incumbent LEC, the lower court's construction of the definition also plays a critical part in undermining the distinction Congress drew between purchasing an incumbent's complete service for resale and purchasing individual "elements" of the network. *Third*, this Court should review the Eighth Circuit's decision approving the FCC's construction of the "necessary" and "impair" standards for determining when access to network elements is required. By making it a foregone conclusion that access to elements must always be granted, this determination also plays a role in making it possible for entrants to count on elements as a substitute for purchasing finished service.

To grant review solely on the question the FCC has presented would bring before this Court only one small part of the Eighth Circuit's carefully integrated construction of the obligation to provide unbundled elements. Reviewing that decision -- on which the FCC *lost* -- without also reviewing the related decisions on which the FCC *won* would not only be patently unfair but would also likely lead to an incoherent construction of the unbundling duty imposed by Congress. In short, this Court cannot wade only halfway into the complex of issues presented by the lower court's construction of the duty to provide unbundled network elements.[6]

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[6] For the reasons stated in GTE's brief in opposition to the petitions filed in these cases, GTE believes that the jurisdictional question presented by the petitions (*i.e.*, Question 1 in the FCC's petition) is also not worthy of review. If, however, the Court were to grant review on the jurisdictional question *without granting review of Question 2*, there would be no need for the Court to review the questions presented by this conditional cross-petition.

I. This Court Should Not Review the Eighth Circuit's Determination That Entrants May Not Obtain Pre-Assembled Platforms of Elements Without Also Reviewing the Holding That New Entrants Could Provide Service Solely Through Network Elements.

A. The Eighth Circuit Expressly Rested Its Decision Allowing Entrants To Provide Service Solely Through Network Elements On Its Determination That Entrants Must Combine Elements for Themselves.

In their petitions for certiorari, the FCC and its supporters seek review of the Eighth Circuit's determination that incumbents may not be required to provide network elements already preassembled as they are used in the incumbent's operating network. If this Court agrees to review that determination, it is imperative that it also address another aspect of the judgment below that followed logically from it. The Eighth Circuit made it clear that its decision requiring entrants to combine elements for themselves provided a crucial predicate for its ruling that entrants could rely solely on network elements to provide service.

As outlined above, GTE and other incumbent LECs had argued that allowing entrants to provide service solely through a combination of network elements would simply open the floodgates to rampant arbitrage. It would provide another avenue for obtaining effectively the same thing as wholesale service, but at a price well below the wholesale rate specified by the Act -- a price, moreover, that would allow entrants to avoid any contribution toward supporting universal service.

In the Eighth Circuit's view, however, the costs and risks new entrants would have to shoulder in combining elements for themselves provided a critical answer to these concerns. The Court explained that its ruling finding that section 251(c)(3) "does not require an incumbent LEC to combine the elements

for a requesting carrier" established that entrants would have to combine elements themselves and that "this decision . . . increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry and *simultaneously makes resale distinct and attractive option.*" AT&T App. 56a-57a (emphasis added). Indeed, in striking down 47 C.F.R. § 51.315(b) (the FCC's rule requiring incumbents to provide pre-assembled packages of elements), the Court made it clear that, in its view, eliminating the option of obtaining such a package was crucial for ensuring that purchasing elements (even *all* the elements needed to provide service) would not become an end-run around the resale provisions in the Act. As the Eighth Circuit put it, "[t]o permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." AT&T App. 71a.

In short, the Eighth Circuit made it clear that its decision allowing entrants to purchase *all* the elements needed to provide finished service depended critically on its understanding that entrants would have to undertake the burden of combining elements for themselves. As a result, if this Court grants review on Question 2 in the FCC's petition, it is imperative that the Court also grant review to address the ruling allowing entrants to provide service solely through network elements.[7]

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[7] In their reply briefs in Petition Nos. 97-826 and 97-829, the dominant long-distance companies (AT&T and MCI) both claim that GTE and the other incumbent local telephone companies do not dispute that the Eighth Circuit's invalidation of § 5.315(b) of the First Report and Order "cripples" and/or "severely set[s] back" the use of an incumbent's unbundled network

(continued...)

B. If This Court Revisits the Ruling That Entrants Must Combine Elements for Themselves, It Should Also Reconsider the Eighth Circuit's Decision Allowing Entrants to Rely Solely on Network Elements To Provide Service.

As the above should make clear, the Eighth Circuit viewed its ruling that entrants could not obtain preassembled packages of elements as one crucial check on network elements that would prevent the use of elements from becoming simply a means to circumvent the Act's resale provisions. Congress provided a specific means for new entrants to obtain an incumbent's finished service for resale and placed both a particular pricing rule and additional restrictions on the use of such wholesale service. By approving the FCC's rules allowing entrants to obtain an incumbent's service through another route, the Eighth Circuit opened a potential end-run around the limitations Congress carefully constructed in the Act.

The plain terms of sections 251(c)(3) and (4) make it clear that the purchase of unbundled elements and the purchase of service at wholesale were designed to provide distinct routes of entry into the local market. An entrant that wished simply to resell an incumbent's service, and thus to "compete" solely through its skills as a marketer, could buy the incumbent's service at wholesale under section 251(c)(4). Section

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[7] (...continued)
elements to enter the market for local telephone service. AT&T Reply Br. at 1, No. 97-826; MCI Reply Br. at 2, No. 97-829. These assertions of alleged concession are preposterous. To the contrary, the Court of Appeals' invalidation of § 51.315(b), while *upholding* the vast majority of the FCC's overbroad unbundling rules, does *nothing* to prevent new entrants from using all pieces of the incumbent's network to facilitate or achieve entry. Instead it merely prevents the worst imaginable regulatory arbitrage and evasion of the Act's explicit requirements. No new entrant can be denied some or all of the needed facilities under the Court of Appeals' ruling.

251(c)(3), on the other hand, provided an avenue for entrants to obtain individual "elements" or pieces of the incumbent's network that the entrant would have to "combine" to provide service. In providing such distinct alternatives, the structure of the Act makes it plain that network elements are intended for entrants who will actually be using *some* facilities of their own and who will not, like purchasers of wholesale services, simply be middlemen reselling an incumbent's service over the same network. The Eighth Circuit's construction eliminates that crucial distinction.

It is only the Eighth Circuit's related decision ensuring that entrants will not be able to obtain the network preassembled into a functioning package that at least partially preserves a critical difference between purchasing elements and purchasing wholesale service. Entrants that must combine network elements for themselves must perform some of the functions (and must possess some of the basic expertise) of actual local exchange carriers and cannot rely wholly on the incumbent for everything.

Even so, the Court's ruling will not eliminate all concerns for arbitrage that are raised by making an incumbent's entire network available as "unbundled elements." As explained above, the pricing standard for wholesale service was explicitly designed to ensure that prices for entrants would reflect existing state subsidy systems used to support universal service. Under the prevailing interpretation of the cost-based pricing standard applied to network elements,[8] however, an entrant can obtain the same finished service through buying a collection of network elements without making any contribution to universal service. Even if the entrant may have to shoulder some additional costs in combining elements, it

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[8] As noted above, GTE is currently challenging the construction of the cost-based pricing standard that excludes consideration of the costs incumbents incur in supporting state-mandated universal service subsidies.

may not have to bear the same costs of the subsidy system that are imposed on incumbents. At any rate, it is abundantly clear that the Eighth Circuit's holding on pre-assembled packages provides the only check preventing entrants from engaging in rampant arbitrage based on the price differential between elements and wholesale service.

Similarly, the Eighth Circuit's ruling striking down the requirement that incumbents provide preassembled packages of elements provides the critical restriction limiting entrants' ability to use network elements to evade another important limitation on finished services. Under section 271(e)(1), Congress directed that new entrants who obtained local service from an incumbent Bell Operating Company (BOC) under section 251(c)(4) could not jointly market that service with long distance service until the BOC itself was authorized to provide long distance service (or until three years after passage of the Act). In that way, Congress ensured that a long distance carrier could not obtain an artificial advantage over incumbent BOCs by simply purchasing the BOC's service at wholesale and providing customers with one-stop shopping for both local and long distance service while the BOC was still legally barred from providing long distance service itself.[9]

The Eighth Circuit's reading of the Act raises the possibility that entrants could garner precisely the same advantage by the simple expedient of acquiring an incumbent's service through purchasing a complete set of elements. Once again, the requirement under the Eighth Circuit's ruling that the entrant must re-combine the elements for itself (or that it pay a negotiated fee for obtaining the elements combined) is the only check preventing the use of network elements from becoming an easy route for avoiding the Act's restrictions on

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[9] Under section 271, BOCs may not provide long distance service in their home regions until they have complied with a checklist of requirements set out in the Act. *See* 47 U.S.C. § 271(a)-(c).

wholesale service. At the very least, therefore, it should be clear that this Court cannot review the Eighth Circuit's decision on preassembled packages of network elements (as the FCC would like) without also revisiting the lower court's ruling allowing entrants to rely solely on an incumbent's network elements to provide service. To do so would virtually guarantee a distorted construction of the Act.

II. The Eighth Circuit's Rulings Concerning What Constitutes a "Network Element" Are Part of the Same Integrated Construction of the Unbundling Obligation Under the Act and Were Erroneous.

If this Court decides to review the Eighth Circuit's ruling concerning pre-assembled packages of elements, it should also address a third aspect of the lower court's interpretation of the duty to provide unbundled elements. The Eighth Circuits' acceptance of the FCC's rules concerning what constitutes a "network element" are also a closely inter-related aspect of the Court's understanding of the unbundling duty. Indeed, the FCC's expansive construction of the term "network elements," upheld by the Court of Appeals, makes it possible for entrants to operate a local exchange business while obtaining all their inputs from an incumbent carrier. Under the FCC's reading of the term, an entrant can buy as an "element" the software systems -- such as billing software -- needed to run its business and can even obtain separate services -- such as operator services -- that the incumbent offers to its customers. The FCC's expansive reading of the term is thus a critical part of the overall interpretation that allows entrants to use network elements as a substitute for buying wholesale service.

Under section 153(29), a network element is a "facility or equipment used in the provision of a telecommunications service," and includes "features, functions, and capabilities that are provided by means of such facility or equipment." The terms "facility or equipment" make it clear that an "element" is a physical piece of hardware. This "network element,"

moreover, must be a part of the "network" -- that is, it must be a part of the network of lines and other facilities used in transmitting a telephone call. Indeed, the Act specifies that elements are pieces of equipment "used in the provision of a telecommunications service," and "telecommunications" is explicitly defined as "the transmission, between or among points specified by the user, of information of the user's choosing." 47 U.S.C. § 153(43). To be used in such a transmission, an element obviously must be part of the incumbent LEC's call-routing network.

While the definition of elements does extend to certain "features, functions, and capabilities" that may not in themselves be pieces of equipment, it is plainly limited to "features, functions and capabilities that are provided *by means of such facility or equipment.*" The definition thus remains rooted in physical parts of the call-routing network.

The definition also goes on to list some examples of the types of features and functions that might qualify as elements, "including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Nothing in that explanatory listing in any way alters *the basic restriction limiting elements to parts of the network*. Data such as subscriber numbers and information sufficient for billing is contained in computers that are part of the network. Similarly, the term "signaling systems" refers to facilities such as the SS7 signaling network that most LECs have established to carry signaling information for routing a call separate from the voice transmission that constitutes the call itself.

When the technical terms of the definition are carefully traced, it is clear that the definition crafted by Congress accurately reflects the basic purpose of the unbundling obligation imposed by the Act: to make available to new entrants the essential facilities of the call-routing network so

that entrants might begin to compete without having to construct an entirely new network of their own. The duty was *not* designed to allow the new entrant to appropriate for its own use all of the aspects of the incumbent's business by which the incumbent can distinguish itself in a competitive marketplace.

The Eighth Circuit, however, accepted the FCC's view that access to network elements granted entrants far more expansive access to an incumbent LEC's operations. Following the FCC's rationale, the Court noted that network elements must be used "in the provision of a telecommunications *service*." § 153(29) (emphasis added). Emphasizing that telecommunications *service* was defined as the "offering of telecommunications for a fee directly to the public," § 153(46), the Eighth Circuit reasoned that virtually anything an incumbent LEC used in operating its business played a part in such "offering" of telecommunications, and thus that there was no limitation restricting "network elements" to parts of the network. *See* AT&T App. 42a-43a.

As a result, the court below agreed with the FCC that entrants could obtain access to typically proprietary software systems known as operational support systems ("OSS") that LECs have developed for myriad functions in running their businesses. These systems have no role in transmitting a call over the network, but rather are background systems that LECs have developed to run their operations more efficiently. Thus, they typically are used in managing billing functions or in connection with customer service -- for example, in recording and automatically routing service requests to appropriate service personnel. The FCC, indeed, made it clear that in requiring access to OSS its goal was to give entrants the ability to perform business functions such as "pre-ordering, ordering, . . . and billing," First Report and Order ¶ 518, App. 4a-5a, as well as "basic service functions [such] as scheduling customer appointments," *id.* ¶ 519, App. 5a-7a, in "substantially the same time and manner that an incumbent can for itself,"

id. ¶ 518, App. 4a-5a. In other words, the agency wanted to ensure that any business skills LECs had perfected and reduced into working software systems would be made available to entrants. Nothing in the text of the Act, however, remotely suggests that access to "network elements" was intended to give entrants such pervasive use of the systems incumbents have developed for running their businesses.

The Eighth Circuit also accepted the FCC's decision that operator services -- that is, the service offered by live operators answering customers' calls -- should be treated as a "network element." AT&T App. 44a. It should be obvious, however, that operators are not a "facility" or "equipment." Nor are they even "features, functions, or capabilities" of equipment in the network. To the contrary, operator assistance is a separate service that incumbents provide their customers.

The expansive definition of network elements adopted by the FCC not only conflicts with the plain terms of the Act, it also plays a critical part in transforming access to network elements from an avenue for entrants to obtain a few selected pieces of an incumbent's network to fill out their own facilities to a complete substitute for purchasing service for resale. The FCC's expansive reading ensures that an entrant can obtain access to everything it needs to provide service -- including even operators -- solely by relying on "network elements." The FCC's reading of the definition is thus part and parcel of an interpretation of the Act that raises the threat of inefficient arbitrage by providing entrants two routes with different prices for obtaining the same thing -- finished local service.

Once again, it is only the Eighth Circuit's related decision requiring entrants to combine elements for themselves that mitigates the destructive arbitrage that would result from the FCC's overbroad construction of the definition of elements. Thus, if this Court were even to consider revisiting the Eighth Circuit's decision ruling out the availability of pre-assembled packages of elements, to ensure that any decision from this

Court would reconstruct a balanced interpretation of the Act, the Court should also revisit the Eighth Circuit's acceptance of the FCC's interpretation of the definition of network elements.

III. The FCC's Construction of the Standard Under which Elements Must Be Made Available Misinterprets the Act and Exacerbates the Potential for Arbitrage.

A final aspect of the Eighth Circuit's decision also plays a critical role in raising the threat of arbitrage under the Act and thus also warrants review if this Court decides to revisit the Court of Appeals' decision requiring entrants to combine elements for themselves. By accepting the FCC's distorted reading of the standard Congress specified for allowing access to unbundled elements, the Court of Appeals ensured that entrants could obtain network elements virtually on demand, without limitation. By making it that much easier for entrants to rely on their ability to claim access to the entire network in the form of elements, this decision once again plays a role in raising the threat that network elements will be used simply as an end run around the Act's resale provisions.

In section 251(d)(2) of the Act, Congress spelled out the "access standards" that the FCC was required to apply "in determining what network elements should be made available." The section commands that the FCC "shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is *necessary*, and (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." (Emphasis added.) By focusing on whether an element is "necessary" or whether its absence would "impair" an entrant's ability to provide service, the Act straightforwardly requires that a requesting carrier establish some showing of *need* before it is granted access to an incumbent's network. In Congress's view, in other words, there had to be a justification for requiring an incumbent to provide access to a particular part of its network.

That judgment makes perfect sense given the overall structure and purposes of the Act. The duty to provide access to network elements was designed to give a jump-start to competition by allowing competitors to use some parts of the existing network while at the same time promoting the ultimate goal of facilities-based competition. The Act would have undermined any incentive for entrants to develop their own facilities or to adapt existing equipment to their use, however, if they could automatically demand access to any part of the incumbent's network.

Moreover, limiting access to proprietary elements to situations in which such access was truly *necessary* served another important goal. Preserving an incumbent's exclusive rights to its proprietary innovations is critical for maintaining incentives to continue investing in new developments. Incumbents, after all, would see little benefit in investing in research for new innovations if their successful ventures would immediately be turned over to competitors as unbundled elements.

The FCC, however, ignored the standards set by Congress and effectively eviscerated any limitation that section 251(d)(2) provided on access to elements. The FCC determined that any evaluation of whether an element was "necessary" or whether failing to provide it would "impair" an entrant's ability to provide service should be made solely by considering whether the requesting carrier could obtain a substantially similar facility from elsewhere *within the incumbent LEC's own network*. *See* First Report and Order ¶¶ 283, 287, App. 1a-3a. The FCC thus ruled out of consideration the availability of comparable facilities from any other source. It should be obvious, however, that if one looks for substitutes solely within an incumbent's own network, virtually every element will seem "necessary" to an entrant -- most networks do not have needlessly duplicative facilities. The FCC thus guaranteed that entrants would always be able to make a sufficient showing to

gain access to whatever elements they wanted from an incumbent, even if similar facilities might be available in the market from other sources. To justify its approach, the FCC explained that requiring competitors to "duplicate" parts of the existing network "could generate delay and higher costs for new entrants." First Report and Order ¶ 283, App. 1a-2a. That rationale, however, turns the Act on its head by deriding as unnecessary "duplication" precisely what Congress sought to promote: facilities-based competition.

By accepting the FCC's reading of section 251(d)(2), the Eighth Circuit exacerbated the threat that network elements would be used to circumvent the Act's provisions on wholesale service. Removing any limitation on access to elements, after all, makes it that much easier for entrants to count on an end-to-end set of elements as a substitute for buying service at wholesale. Thus, if this Court were to revisit the one critical limitation the Eighth Circuit placed on unbundled elements -- the requirement that entrants must combine elements for themselves -- it should also reconsider the Court of Appeals' ruling affirming the FCC's watered-down standards for allowing access to elements in the first place.

CONCLUSION

The Eighth Circuit provided a balanced and workable construction of the duty imposed by section 251(c)(3) requiring incumbents to make unbundled elements of their networks available to entrants. No further review of that decision is warranted. Nevertheless, if the Court grants review on Question 2 in the petition for certiorari filed by the FCC, to ensure that the Court has before it all of the interrelated issues that must be addressed to arrive at a coherent construction of the unbundling duty, the Court should also grant review on the questions presented in this conditional cross-petition.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM *IN THE MATTER OF IMPLEMENTATION OF LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996*, FIRST REPORT AND ORDER CC DOCKET NO. 96-98 (AUG. 8, 1996) ¶¶ 712-715, 283, 287, 516-519, 534-39

V. ACCESS TO UNBUNDLED NETWORK ELEMENTS

E. Standards Necessary to Identify Unbundled Network Elements

3. Discussion

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283. We further conclude that, to the extent new entrants seek additional elements beyond those we identify herein, section 251(d)(2)(A) allows the Commission and the states to require the unbundling of such elements unless the incumbent can prove to a state commission that: (1) the element is proprietary, or contains proprietary information that will be revealed if the element is provided on an unbundled basis; and (2) a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network. We believe this interpretation of section 251(d)(2)A) will best advance the procompetitive purposes of the 1996 Act. It allows new entrants to obtain proprietary elements from incumbent LECs where they are necessary to offer a telecommunications service, and, at the same time, it gives incumbents the opportunity to argue, before the states or the Commission, against unbundling proprietary elements where a new entrant could offer the same service using other

unbundled elements in the incumbent's network. We decline to adopt the interpretation of section 251(d)(2)(A) advanced by some incumbents that incumbent LECs need not provide proprietary elements if requesting carriers can obtain the requested proprietary element from a source other than the incumbent. Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.

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287. The interpretation advanced by most of the BOCs and GTE, described above, means that, if a requesting carrier could obtain an element from a source other than the incumbent, then the incumbent need not provide the element. We agree with the reasoning advanced by some of the commenters that this interpretation would nullify section 251(c)(3) because, in theory, any new entrant could provide all of the elements in the incumbents' networks. Congress made it possible for competitors to enter local markets through the purchase of unbundled elements because it recognized that duplication of an incumbent's network could delay entry, and could be inefficient and unnecessary.[606] The interpretation proffered by the BOCs and GTE would inhibit new entry and thus restrict the potential for meaningful competition, which would undermine the procompetitive goals of the 1996 Act. As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach. Additionally, as discussed above at section IV.C, we believe that allowing incumbent

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[606] *See* LDDS comments at 37, reply at 14-15.

LECs to deny access to unbundled elements on the grounds that an element is equivalent to a service available at resale would lead to impractical results, because incumbents could completely avoid section 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services.[607]

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J. Specific Unbundling Requirements

5. Operation Support Systems

c. Discussion

516. We conclude that operations support systems and the information they contain fall squarely within the definition of "network element" and must be unbundled upon request under section 251(c)(3), as discussed below. Congress included in the definition of "network element" the terms "databases" and "information sufficient for billing and collection or used in the transmission, routing, *or other provision* of a telecommunications service."[1253] We believe that the inclusion of these terms in the definition of "network element" is a recognition that the massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LECs can market, order, provision, and maintain telecommunications services and facilities. Thus, we agree

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[607] *See infra*, Section V.H, for a further discussion on the relationship between sections 251(c)(3) and 251(c)(4).

[1253] 47 U.S.C. § 153(29) (emphasis added).

with Ameritech that "[o]perational interfaces are essential to promote viable competitive entry."[1254]

517. Nondiscriminatory access to operations support systems functions can be viewed in at least three ways. First, operations support systems themselves can be characterized as "databases" or "facilit[ies] . . . used in the provision of a telecommunications service," and the functions performed by such systems can be characterized as "features, functions, and capabilities that are provided by means of such facilit[ies]."[1255] Second, the information contained in, and processed by operations support systems can be classified as "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[1256] Third, nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a "term or condition" of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4). Thus, we conclude that, under any of these interpretations, operations support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions.

518. Much of the information maintained by these systems is critical to the ability of other carriers to compete with incumbent LECs using unbundled network elements or resold services. Without access to review, *inter alia*, available telephone numbers, service interval information, and

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[1254] Ameritech July 10 *Ex Parte* at 5.

[1255] 47 U.S.C. § 153(29).

[1256] *Id.*

maintenance histories, competing carriers would operate at a significant disadvantage with respect to the incumbent. Other information, such as the facilities and services assigned to a particular customer, is necessary to a competing carrier's ability to provision and offer competing services to incumbent LEC customers.[1257] Finally, if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing. Thus providing nondiscriminatory access to these support systems functions, which would include access to the information such systems contain, is vital to creating opportunities for meaningful competition.

519. As noted in the comments above, several state commissions have ordered real-time access or have ongoing proceedings working to develop and implement it within their jurisdictions. The New York Commission, building on its pioneering experience with the Rochester Telephone "Open Market Plan," has facilitated a working group on electronic interfaces comprised of both incumbent LECs and potential competitors.[1258] The New York Commission focused on these issues in response to the frustrations and concerns of resellers

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[1257] For these reasons, it is most important that incumbent LECs, which currently own the overwhelming majority of local facilities in any market, provide this information to those new entrants who initially will rely to varying degrees on incumbent LEC facilities. *See e.g.*, AT&T comments at 33-34.

[1258] Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et al.* (New York Commission June 25, 1996).

in the Rochester market.[1259] In particular, AT&T alleged that it was "severely disadvantaged due to the fact that [Rochester Telephone] has failed to provide procedures for resellers to access [their] databases for on-line queries needed to perform basic service functions [such] as scheduling customer appointments."[1260] The New York Commission has concluded that wherever possible NYNEX will provide new entrants with real-time electronic access to its systems.[1261] As another example, the Georgia Commission recently ordered BellSouth to provide electronic interfaces such that resellers have the same access to operations support systems and informational databases as BellSouth does, including interfaces for pre-ordering, ordering and provisioning, service trouble reporting, and customer daily usage.[1262] In testimony before the Georgia Commission, a BellSouth witness acknowledged that "[n]o one is happy, believe me, with a system that is not fully electronic."[1263] As noted above, Georgia ordered BellSouth to establish these interfaces within two months of its order (by

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[1259] Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et al.* (New York Commission June 25, 1996). In New York proceeding, resellers argued that interfaces were as important to competition as the level of the wholesale discount. *Id.*

[1260] AT&T Communications of New York, Inc. Complaint, Petition for Declaratory Judgement and for Reconsideration of Opinion No. 94-25 New York Commission, page 12.

[1261] *Id.* at 13-14. The New York Commission operations working group has focused on five areas for implementation: (1) service ordering, (2) trouble administration, (3) credit and collection, (4) billing and usage detail, (5) local exchange company requirements. *Id.* at 13-17.

[1262] *See* In Re Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Conditions and the Initial Unbundling of Services, Docket 6352 (Georgia Commission May 29, 1996).

[1263] *Id.*

July 15, 1996), but recently extended the deadline an additional month (to August 15th).[1264] Both the Illinois and Indiana Commissions ordered incumbent LECs immediately to provide to competitors access to operational interfaces at parity with those provided to their own retail customers, or submit plans with specific timetables for achieving such access.[1265] Several other states have passed laws or adopted rules ordering incumbent LECs to provide interfaces for access equal to that the incumbent provides itself.[1266] We recognize the lead taken by these states and others, and we generally rely upon their conclusions in this Order.

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[1264] Motion for Reconsideration in Docket No. 6352-U (Georgia Commission July 2, 1996).

[1265] In the Matter of the Investigation on the Commission's Own Motion into Any and All Matters Relating to Local Telephone Exchange Competition Within the State of Indiana, Case No. 39983, Interim Order on Bundled Resale and Other Issues (Indiana Commissions July 1, 1996); *Illinois Wholesale Order*.

[1266] *See e.g.*, Texas Commission comments at 19; In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1995).

6. Other Network Elements

c. Discussion

(1) Operator Services and Directory Assistance

534. We conclude that incumbent LECs are under the same duty to permit competing carriers nondiscriminatory access to operator services and directory assistance facilities as all LECs are under section 251(b)(3).[1267] We further conclude that, if a carrier requests an incumbent LEC to unbundle the facilities and functionalities providing operator services and directory assistance as separate network elements, the incumbent LEC must provide the competing provider with nondiscriminatory access to such facilities and functionalities at any technically feasible point. We believe that these facilities and functionalities are important to facilitate competition in the local exchange market. Further, the 1996 Act imposes upon BOCs, as a condition of entry into in-region interLATA services the duty to provide nondiscriminatory access to directory assistance services and operator call completion services.[1268] We therefore conclude that unbundling facilities and functionalities providing operator services and directory assistance is consistent with the intent of Congress.

535. As discussed in our section on nondiscriminatory access under section 251(b)(3),[1269] the provision of nondiscriminatory access to operator services and directory

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[1267] *See Dialing Parity Order supra,* Section I.

[1268] 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III).

[1269] *See Dialing Parity Order supra,* Section I.

assistance must conform to the requirements of section 222, which restricts carrier's use of CPNI.[1270] In particular, access to directory assistance and underlying directory information does not require incumbent LECs to provide access to unlisted or unpublished telephone numbers, or other information that the incumbent LEC's customer has requested the LEC not to make available. In conforming to section 222, we anticipate that incumbent LECs will provide such access in a manner that will protect against the inadvertent release of unlisted customer names and numbers.

536. We note that several competitors advocate unbundling the facilities and functionalities providing operator services and directory assistance from particular resold services or the unbundled local switching element, so that a competing provider can provide these services to its customers supported by its own systems rather that those of the incumbent LEC.[1271] Some incumbent LECs argue that such unbundling, however, is not technically feasible because of their inability to route individual end user calls to multiple systems.[1272] We find that unbundling both the facilities and functionalities providing operator services and directory assistance as separate network elements will be beneficial to competition and will aid the ability of competing providers to differentiate their service from the incumbent LECs. We also note that the Illinois

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[1270] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of customer Proprietary Network Information and other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996).

[1271] *See, e.g.*, AT&T comments at 26; Cable & Wireless comments at 20; Colorado Commission comments at 24; DOJ comments at 21; Frontier comments at 17 n.32; MCI comments at 18-20; Jones Intercable reply at 30.

[1272] SBC reply at 22-23.

Commission has recently ordered such access.[1273] We therefore find that incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible. As discussed above in our section on unbundled switching, we require incumbent LECs, to the extent technically feasible, to provide customized routing, which would include such routing to a competitor's operator services or directory assistance platform.[1274]

537. We also note that some competitors seek access to operator services and directory assistance in order to serve their own customers.[1275] Some of these parties argue that nondiscriminatory access to such network elements requires incumbent LECs to provide rebranded operator call completion services and directory assistance to the competing carrier's customers.[1276] Incumbent LECs argue that the provision of these services on an unbranded or rebranded basis is not technically feasible because of their inability at the operator services or directory assistance platforms to identify the carrier serving the end user.[1277] As we concluded in our discussion on section 251(b)(3), we find that incumbent LECs must permit nondiscriminatory access to both operator services and directory assistance in the same manner required of all

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[1273] *See Illinois Wholesale Order.*

[1274] *See infra,* Section V.I.2.

[1275] AT&T comments at 26.

[1276] ACSI comments at 47-48; AT&T comments at 26; Comcast comments at 20; GCI comments at 12.

[1277] SBC reply at 22-23.

LECs.[1278] We make no finding on the technical feasibility of providing branded or unbranded service to competitors based on the record before us. We note, however, that the Illinois Commission has ordered incumbent LECs to provide rebranded operator call completion services and directory assistance to requesting competitive carriers.[1279]

538. As discussed above, incumbent LECs must provide access to databases as unbundled network elements.[1280] We find that the databases used in the provision of both operator call completion services and directory assistance must be unbundled by incumbent LECs upon a request for access by a competing provider. In particular, the directory assistance database must be unbundled for access by requesting carriers.[1281] Such access must include both entry of the requesting carrier's customer information into the database, and the ability to read such a database, so as to enable requesting carriers to provide operator services and directory assistance concerning incumbent LEC customer information. We clarify, however, that the entry of a competitor's customer information into an incumbent LEC's directory assistance database can be mediated by the incumbent LEC to prevent unauthorized use of the database. We find that the arrangement ordered by the California commission concerning the shared

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[1278] *See Dialing Parity Order supra*, Section I.

[1279] *See Illinois Wholesale Order.*

[1280] *See supra*, Section V.J.

[1281] We find the joint directory assistance database used by Pacific Bell and GTE to be one method of such access. MCI comments at 38.

use of such a database by Pacific Bell and GTE is one possible method of providing such access.[1282]

539. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary."[1283] Parties generally did not identify proprietary concerns with unbundling access to operator call completion services or directory assistance. Incumbent LECs generally did not claim a proprietary interest in their directory assistance databases. Many parties contend that proprietary interests leading to restrictions on use or sharing of such database information would injure their ability to compete effectively for local service.[1284] For the reasons described below, we find that access to the systems supporting both operator call completion services and directory assistance is necessary for new entrants to provide competing local exchange service.

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[1282] *See Re GTE California Incorporated*, 31 CPUC 2d 370 (1989).

[1283] 47 U.S.C, § 251(d)(2)(A).

[1284] MCI comments at 37-38.

VII. PRICING OF INTERCONNECTION AND UNBUNDLED ELEMENTS

B. Cost-Based Pricing Methodology

2. Rate Levels

a. Pricing Based on Economic Cost

(3) Discussion

(b) Cost Measures Not Included in Forward-Looking Cost Methodology

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712. *Universal Service Subsidies.* We conclude that funding for any universal service mechanisms adopted in the universal service proceeding may not be included in the rates for interconnection, network elements, and access to network elements that are arbitrated by the states under sections 251 and 252. Sections 254(d) and 254(e) of the 1996 Act mandate that universal service support be recovered in an equitable and nondiscriminatory manner from all providers of telecommunications services.[1727] We conclude that permitting states to include such costs in rates arbitrated under sections 251 and 252 would violate the requirement by requiring carriers to pay specified portions of such costs solely because they are purchasing services and elements under section 251. Section 252(d)(1) requires that rates for interconnection, network elements, and access to network elements reflect the

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[1727] Joint Explanatory Statement at 131 ("In keeping with the conferees' intent that universal service support should be clearly identified, [section 254(e)] states that such support should be made explicit . . .").

costs of providing those network elements, not the costs of supporting universal service.

713. Section 254(f) provides that a state may adopt equitable, nondiscriminatory, specific, and predictable mechanisms to advance universal service within that state.[1728] If a state collects universal service funding in rates for elements and services pursuant to sections 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing sections 251 and 252 which require that these rates be cost-based. It is also inconsistent with the requirement of section 254(f) that telecommunications carriers contribute to state universal service on a nondiscriminatory basis, because telecommunications carriers requesting interconnection or access to unbundled network elements will be required to make contributions to universal service support through such surcharges.[1729] States may not, therefore, include universal service support funding in the rates for elements and services pursuant to sections 251 and 252, nor may they implement mechanisms that have the same effect. For example, states may not fund universal service support by imposing higher rates for interconnection, unbundled elements, or transport and termination on carriers that offer service to different types of customers or different geographic areas. To the extent that New York's "pay or play" system funds universal service in this manner, it violates sections 251, 252, and 254 of the 1996 Act. Nothing in the 1996 Act or in this Order, however, precludes a state from adopting a universal service funding mechanism, whether interim or otherwise, if such funds are collected in accordance with section 254(f) on an "equitable

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[1728] 47 U.S.C. § 254(f).

[1729] *See infra*, Section VII.D.3., discussing discrimination.

and nondiscriminatory basis" through "specific, predictable, and sufficient mechanisms that do not rely on or burden Federal universal service support mechanisms."[1730]

714. Our decision here does not exempt carriers purchasing elements or services under section 251 from contributing to (or possibly receiving) universal service support. Rather, the recovery of universal service support costs from telecommunications carriers, including carriers requesting unbundled network elements, will be governed by section 254 of the 1996 Act. Federal universal service support mechanisms will be determined by our decisions reached in CC Docket 96-45, based on the recommendations of the Federal/State Universal Service Joint Board, and states may adopt additional universal service support mechanisms consistent with section 254(f).

715. We are mindful that the requirements of the 1996 Act may be disruptive to existing state universal service support mechanisms during the period commencing with this order and continuing until we complete our universal service proceeding to implement section 254. As discussed in the subsection immediately below, we permit incumbent LECs to continue to recover certain non-cost-based interstate access charge revenues for a limited period of time, largely because of concerns about possible deleterious impacts on universal service. We also authorize incumbent LECs, for a similar limited period of time, to continue to recover explicit intrastate universal service subsidy revenues based on intrastate access charges. This mechanism minimizes any possibility that implementation of sections 251 and 252 will unduly harm universal service during the interim period prior to completion of our universal service and access reform proceedings.

[1730] 47 U.S.C. § 254(f).

Because we conclude this action should adequately provide for the continuation of a portion of existing subsidy flows during a transition period until completion of our proceeding implementing section 254, we decline to permit any additional funding of universal service support through rates for interconnection, unbundled elements, and transport and termination during the interim period.